

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

60247 97650

FILE: B-183216

DATE: November 28, 1975

MATTER OF: Emventions Inc. - Request for Reconsideration

DIGEST:

Prior decision involving RFP to study and evaluate scientific procedures for evolvement of an optimal method and protester's exclusion from competitive range is affirmed on reconsideration because (1) no deviation found in agency technical evaluation from RFP's Scope of Work; (2) protester's proposal contained predetermination of optimal method rather than demonstration of RFP requirement for objectivity; (3) RFP requirement for objectivity is supportable and does not call for ethical judgment of offeror's credibility; and (4) challenge to qualification of technical evaluator is not considered.

This decision is issued in response to a request by Emventions Inc., that we reconsider our decision, Emventions Inc., B-183216, June 16, 1975, 75-1 CPD 368, denying its protest against the conduct of the technical evaluation and the exclusion of its offer from the competitive range by the Environmental Protection Agency (EPA) under request for proposals (RFP) No. DU-75-B019, to study and evaluate electron microscope methods (EM) for the measurement of airborne asbestos concentration and to evolve an optimal procedure from this study.

The offerors were requested to submit a technical proposal which would outline the approach to be used in achieving the objectives and requirements set forth in the RFP. The RFP set forth the following Scope of Work as the objective for the study:

"The contractor shall conduct an experimental program to evaluate current electron microscope (EM) procedures for determining airborne asbestos fiber counts and size distributions and to develop and define a single procedure as optimal with respect to accuracy, precision, analysis time and cost. * * *"
(Relevant wording emphasized.)

B-183216

Each proposal was evaluated against listed criteria and subcriteria. One of the subcriteria, which, in large measure, gave rise to Emventions' original protest was the following:

"III. Capability to accomplish program successfully

* * * * *

"D. Capability to conduct an objective study"

Fifteen proposals were received and each was evaluated against the established criteria. It was concluded by the sponsoring program's technical staff that the proposal submitted by Emventions ranked eleventh out of the fifteen. The top five were declared acceptable and within the competitive range, and the rest including Emventions were found unacceptable from a technical viewpoint and excluded from the competitive range.

The contracting officer indicated in his report furnished our Office in connection with Emventions' original protest that the Emventions proposal was determined to be technically unacceptable for the following reasons:

1. An optimal procedure was already predetermined in the proposal and the plan merely consisted of procedures to develop and test it.
2. The proposed plan cast doubts on the degree of understanding of the problem.
3. Lack of objectivity.

This determination was, in effect, sustained in our decision of June 16, 1975, and Emventions now makes numerous contentions including detailed technical arguments in support of its request for reconsideration. These contentions can be summarized into four main points for analysis.

1. The EPA evaluation was based on goals which deviated from the actual language of the Scope of Work clause of the RFP. In this regard, the protester contends that the General Accounting Office decision did not refute the fact that, in a memorandum written by the EPA technical evaluator, there was a deviation from the Scope of Work by substituting the wording "select or define" for "develop and define" a single optimal procedure.

2. Emventions' proposal did not predetermine an optimal procedure before all other current EM methodology was evaluated.

3. The "objectivity standard" used by the EPA calls for arbitrary administrative discretion in the establishment of the competitive range, and was unreasonably applied to Emventions.

4. The EPA evaluator was unqualified to make a determination on the merits of the proposal.

Insofar as the first point is concerned, in the EPA's cover letter dated October 18, 1974, submitted to prospective offerors with the RFP, it was distinctly stated that the optimal procedure was to be evolved from the evaluation of current EM methods. This concept of evolvment was further discussed in the memorandum of the technical evaluator. The rationale for the goals of the project study was considered to be obvious within the field of airborne asbestos fiber identification and a detailed explanation would have been superfluous and was not included in the Scope of Work. Also, the technical evaluator made the following statements in the memorandum:

"The problems associated with EM methods are well known. The procedures are tedious, expensive * * * and timeconsuming * * * various steps in an EM assay * * * can be sources of large errors. A very chaotic situation exists because there are probably about a dozen EM procedures currently in use that differ from each other with respect to one or more of the steps cited above. There has been no genuine attempt to establish the accuracy or even precision of the various methods and no one could justifiably claim better than an order of

magnitude reliability for analytical data obtained thus far. Moreover, there is an urgent need to establish a single EM procedure as an acceptable standard analytical technique so that valid comparisons can be made of data obtained by different laboratories.

"The purpose of this procurement is to conduct an evaluation of current electron microscope procedures for asbestos analysis, to select or define a single procedure as optimal and to establish its accuracy and precision for determining airborne asbestos fiber counts and size distributions."
(Relevant wording emphasized.)

We believe Emventions' reliance on the words "select or define" to allegedly demonstrate a technical evaluation deviating from the Scope of Work to be misplaced. In our view, the memorandum clearly shows that the evolvement concept was the principal purpose of the procurement. In addition, all offerors received the same evaluation information and each proposal was evaluated according to the same criteria. Many of the offerors submitted proposals which evidenced a satisfactory understanding of the goals of the study and we can see no deviation from the Scope of Work or impropriety as to this aspect of the EPA evaluation.

Emventions now argues that it did not predetermine an optimal procedure and is now providing specific responses from its proposal to indicate that it was not associated with or an advocate of any particular EM method. Although a detailed technical argument is submitted in support of the alleged lack of a predetermination, we are unable to conclude that the contracting agency abused its discretion in finding that the Emventions proposal had a predetermined result.

The Emventions proposal contains numerous statements which clearly indicate the existence of a predetermination directly contrary to what the firm now contends. For example, Emventions, in stating the features of the proposal in its cover letter put emphasis on the superiority of one particular approach over other methods available, as follows:

"The * * * approach is a major technical advance which can be applied to asbestos evaluation * * *"

In conclusion on this point, Emventions' request for reconsideration states that "Emventions will demonstrate in its appeal that it offered EPA a superior technical approach which the EPA evaluator overlooked." In addition, the proposal contains the following statement:

"* * * It is the posture of Emventions that a * * * technique is needed in which an operator shares in a decision-making capacity involving selection of fibers to be quantitated by * * * and selection of end points, etc. for measurement. Such an approach would be far less expensive from an instrumentation standpoint and more accurate, thereby increasing cost effectiveness. Such a system will be custom designed and assembled at Emventions by July 1975 as part of other ongoing programs * * *."

Emventions' contention that the standard of objectivity used by the EPA calls for arbitrary administrative discretion in determining the competitive range was resolved and dismissed in our earlier decision. In that decision, we held that the objectivity standard if applied properly does have a rational basis and a contracting officer can exclude a proposal from the competitive range as technically unacceptable if based on reasonable technical judgments of complex scientific issues. Emventions has presented no new evidence or argument to show unreasonableness or favoritism and from our review, we are satisfied that the evaluations were not arbitrary or capricious but provided a reasonable basis for selecting the most advantageous proposal. See TGI Construction Corporation et al., 54 Comp. Gen. 775 (1975), 75-1 CPD 167; 51 Comp. Gen. 621 (1972).

The claim that the objectivity standard is merely a subjective determination creating an ethical judgment of the offeror's credibility is also without merit. The logical impact of such a standard is that an evaluation is made of each offeror's total proposal and that the subjective judgment of the contracting officer is exercised in determining the ability of the offeror to accomplish the objectives. As we have observed before:

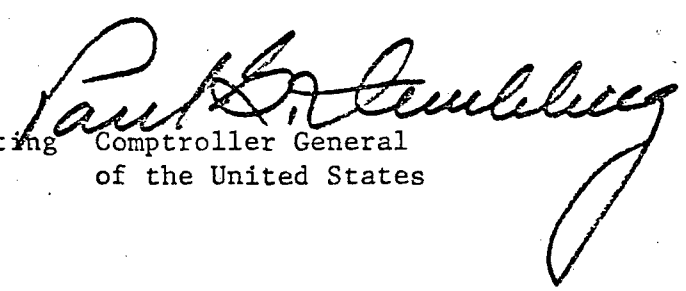
B-183216

"* * * the evaluation in such areas obviously requires a broad exercise of judgment; and we do not believe that the reference to the subjective judgment of the evaluator created an ambiguity as to the factors which were to be evaluated. In such connection, we note that an explanation of the statement was not requested by any of the prospective offerors, and it is elementary that if an offeror had any serious question as to the meaning of the provision he should have presented it prior to the submission of his proposal." 50 Comp. Gen. 565, 574 (1971).

As to Emventions' objection to the qualifications of the EPA evaluator, our Office has no intention of appraising the qualifications of technical personnel of contracting agencies. We have consistently held that such officials are familiar with the Government's actual needs and are in the best position to make and evaluate the appropriate requirements and conditions. Cf. Particle Data, Inc. et al., B-178718, B-179762, May 15, 1974, 74-1 CPD 257; Manufacturing Data Systems, Incorporated, B-180586, B-180608, January 6, 1975, 75-1 CPD 6.

In view of the above, we do not find any justification for modifying our earlier decision inasmuch as it has not been demonstrated that our prior decision involved any mistake of fact nor have any persuasive legal authorities or precedents been advanced which would support any error of law.

Accordingly, our decision is affirmed.


Acting Comptroller General
of the United States